UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

FIRST TRANSIT, INC.

and Cases 28–CA–107463
28–CA–120526

AMALGAMATED TRANSIT UNION (ATU)
LOCAL #1433, AFL-CIO

Chris J. Doyle, Esq., for the General Counsel.
Patrick Domholdt, Esq., for the Respondent Company.
Dwayne Session, for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In late January 2013, the Arizona Regional Public Transit Authority (RPTA) awarded First Transit, Inc. the contract to service the bus routes in Tempe and Mesa, neighboring cities within the Phoenix metropolitan area, effective July 1. Consistent with the RPTA contract, First Transit thereafter retained virtually all of the 500+ drivers/operators employed by the previous contractor (Veolia Transportation) at the two bus yards. It also recognized their bargaining representative, Amalgamated Transit Union (ATU) Local 1433, which had represented the Mesa and Tempe operators since 2001. First Transit began negotiating with the Union in mid-February 2013, well before the effective date of the service contract, executed an interim agreement with the Union on July 1 to cover the first month of operation, and executed a full 3-year collective-bargaining agreement in early September.

The transition from Veolia to First Transit was not all harmony, however. A number of issues or disputes arose during the transition with respect to combining the two workforces. In the past, Veolia had run each city's routes under separate service contracts. The Union had therefore negotiated separate labor agreements with Veolia at each city's yard, and the operators at each yard had separately bid, by seniority, only on which runs they would work out of that yard, i.e. they did not bid on which yard they would work from. In contrast, First Transit's service contract with RPTA covered both cities and essentially combined the two operations. This had two important effects. First, it allowed First Transit to relocate approximately 90 buses and over 100 operators previously assigned to the Mesa yard in order to reduce the "deadhead" (nonrevenue) time on certain Mesa routes that were actually closer to the Tempe yard. Second, it provided an opportunity for the operators to bid on which yard to work from.

However, there was a relatively short window period for First Transit to implement the consolidation before the new bus schedules went into effect. The RPTA reviewed and revised the bus routes semiannually, effective in January and July of each year, and the new July 2013

routes for Tempe and Mesa were scheduled to go into effect on July 22, just 3 weeks after First Transit took over the service from Veolia. Further, there were significant labor issues that the parties had to address, including how the new yard and run bids would be conducted.

As discussed more fully below, First Transit and the Union eventually agreed that the operators at the two yards would be dovetailed into a single, unified seniority list, and that they would bid for which yard they would work from by their new overall seniority ranking before bidding on which of the runs they would work under the new July 22 RPTA bus schedules. This was incorporated into their July 1 interim agreement. Nevertheless, various issues or disputes arose as the process unfolded.

The Union filed a number of unfair labor practice charges over these and other matters, and the General Counsel issued the instant consolidated complaint on February 28, 2014. The complaint alleges that First Transit committed 11 separate violations of Section 8(a)(5) of the National Labor Relations Act, including failing to bargain with the Union over the unified seniority list and the run cuts before posting them for the yard and run bids, failing to comply with the interim agreement in the manner in which it conducted the bidding, making unilateral changes in split-shift, "hot-coach," and behind-the-wheel training work assignments, bypassing the Union and dealing directly with employees, and failing to provide requested information to the Union. The complaint also alleges that the Company committed five additional violations of Section 8(a)(1) of the Act, including denying off-duty employees access to the drivers' lounge to distribute union material, removing union notices from employee bulletin boards, and denying a newly hired bus operator (Karren Schwing) union representation at an investigatory meeting and subsequently terminating her for complaining about the starting wage rate.[1]

A hearing on the foregoing complaint allegations was held over 6 days between March 25 and April 1, 2014, at the NLRB Regional Office in Phoenix. The General Counsel and the Company thereafter filed posthearing briefs on May 20. After carefully considering the briefs and the entire record, for the reasons set forth below I find that the evidence fails to support most of the 8(a)(5) allegations, including the allegations regarding the July 2013 yard and run bids, and the assignment of split shifts and hot-coach work. I also dismiss the 8(a)(1) allegations involving Schwing. However, I find that a preponderance of the evidence supports the allegations that the Company unlawfully failed to assign certain behind-the-wheel training work to qualified unit operators, failed to provide the Union with requested payroll information, denied an off-duty employee access to the drivers' lounge to distribute union material, and removed union notices from employee bulletin boards.[2]

[1] The Board's jurisdiction is undisputed and well established by the record.

[2] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). I have also carefully considered the manner in which the testimony was adduced; in general, I have given less weight to testimony of nonadverse witnesses about disputed matters that was adduced on direct

I. ALLEGED VIOLATIONS REGARDING THE YARD AND RUN BIDS

A. The New Unified Seniority List

The complaint (par. 7 (f)–(i)) alleges three 8(a)(5) violations with respect to the new unified seniority list. First, it alleges that the seniority list was a mandatory subject of bargaining and that First Transit unlawfully posted and implemented it after July 1 without providing the Union with notice and an opportunity to bargain over the list and its effects to an agreement or good-faith impasse. Second, it alleges (par. 7 (a)) that the Company unlawful bypassed the Union and dealt directly with employees by attributing the posted seniority list to the Union when it had not actually approved it. Third, it alleges (par. 7 (l), (n), (p)) that the Company failed to furnish the Union with requested information about certain individuals on the list. For the reasons set forth below, I find that all three allegations are without merit.

The parties discussed merging the Mesa and Tempe seniority lists at their very first meetings on February 19 and 20, 2013. The Union expressed concerns about how to merge the lists and whether to use the operators' dates of hire or seniority. The Company said it would leave it up to the Union how to do it, and the Union said it would seek guidance on the matter from the International Union. (GC Exh. 54; R. Exh. 8; Tr. 327, 469–472, 535, 659–660, 755, 1006–1007.)

The parties continued to discuss seniority at subsequent bargaining sessions, and eventually, on June 30, reached a tentative agreement (TA) on a general seniority provision (Tr. 327–328, 472). The TA (GC Exh. 23 (art. 13)) provided that the seniority lists at Tempe and Mesa would be merged using the dovetail method; that each operator's seniority would be based on his/her original hire date; and that the Union would determine the seniority position of any operators whose hire dates were identical. The TA further provided that the unified seniority roster would be used to conduct the yard bid, and that the Company was responsible for providing and posting the roster, and keeping it up to date.[3]

As mentioned above, the parties executed an interim agreement the following day, Monday July 1, First Transit's first day of operation. The interim agreement (GC Exh. 21) established the terms and conditions of employment that would apply through the remainder of July, when both the yard (a/k/a "system") bid and the run (a/k/a "division" or "general") bid based on the new routes issued by the RPTA effective July 22 would take place.[4] The parties

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examination through leading questions, particularly where the witnesses had not demonstrated a need to have their memory refreshed or had previously given contrary testimony in response to nonleading questions. See generally Fed.R.Evid. 611(c); and *Miller v. Fairchild Industries*, 885 F.2d 498, 514 (9th Cir. 1989), cert. denied 494 U.S. 1056 (1990).

[3] See sec. 4 ("The Company agrees to provide an electronic copy to the Union and keep posted in an accessible place an up-to-date and revised seniority roster showing the name, date of employment, and seniority standing of all employees coming within the scope of this Agreement."); and Tr. 599.

[4] See the RPTA service contract, GC Exh. 18, sec. 9.2.1 ("RPTA currently observes the fourth Monday in January and July as service change effective dates"). The Union clearly knew that the new RPTA routes would be effective in July. See Tr. 306, 1050–1051, 1186–1187, 1192–1193. The Union's financial secretary/treasurer and chief negotiator, Michael Cornelius,

agreed therein to implement the foregoing TA on seniority. They also agreed to implement a separate TA on choice of work assignments (R. Exhs. 4, 5 (art. 38)), which set forth the timetables and procedures for conducting the system and division bids. Among other things, it provided that the Company would give 30-days notice of any bid; that the system bid would be completed before conducting the division bid; that the bid packets for the division bid would be posted at least 3 days before the start of bidding; that the division bidding would be held only on weekdays (Monday through Friday); and that only about 40 employees at each location would bid according to seniority for the runs each day until all had bid. Finally, subject to certain specified exceptions, the parties agreed to otherwise operate under the terms and conditions of employment contained in the Veolia collective-bargaining agreements at Mesa and Tempe (GC Exhs. 9, 10). See Tr. 313–314, 546–550, 582–583, 761.

Two days later, on Wednesday, July 3, the Company's then-general manager, Robert Greenberg,[5] emailed the Union his "best shot" at a merged seniority roster. The roster listed by hire date each of the 546 bus operators that were currently on the company payroll. It also indicated which yard each operator was currently assigned to. Greenberg solicited the Union's help in making sure the roster was accurate, noting that there were 22 former Veolia employees that had not yet been hired because they were on leave. Greenberg stated that, because the Union was required by the contract to approve all leave of absences (LOAs), he was seeking the Union's assistance in identifying which of those individuals had been on leave less than 90 days and were therefore entitled to be hired under the parties' agreement. Finally, Greenberg stated that the roster needed to be finalized "right away" so that the system bid could proceed. (GC Exhs. 24, 24(a); Tr. 331–332, 478, 763–764, 798.)[6]

Receiving no immediate response, 2 days later, on Friday July 5, Greenberg sent another email to the Union. He noted that the Company had not received any comment on the list he had sent to the Union on Wednesday, and requested that the Union return an approved list "as soon as possible." Michael Cornelius, the Union's financial secretary/treasurer and lead negotiator, responded several minutes later. He stated that the Union had been very busy, noting that the parties had been in mediation all day July 3, and that July 4 was a holiday. He said the parties

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acknowledged that the RPTA "directs the schedule" and that First Transit "had to do a system bid right away" in order "to provide the service to the community" (Tr. 528, 541, 566). He also acknowledged that the parties executed the July 1 interim agreement so that they could work together to combine seniority and move forward with the system bid (GC Exh. 25; Tr. 540).

[5] Greenberg left the Company in January 2014 (Tr. 297).

[6] The General Counsel asserts that the July 3 roster was a "faux" seniority list, which Greenberg "concocted," and was "intentionally" incorrect (Br. 19–20, 58). In support, the General Counsel cites Greenberg's "admi[ssion] that [the list] was illegitimate and unworthy of serious consideration by the Union" (Br. 19) , because it was set forth on employee tracking sheets that included headings and columns for recording additional employment information (e.g. the date the employee had passed a drug test). However, Greenberg made no such admission; rather he simply acknowledged that such additional information would not be included on a final list, and that the roster was not meant to be the final list (Tr. 798). I find that there is no evidentiary support whatsoever for the General Counsel's assertions, and that the July 3 roster was exactly what Greenberg's email said it was: the Company's first and "best shot" at a unified seniority list.

should "discuss" the matter during mediation the following Monday, July 8. Greenberg replied a few hours later, stating:

> I understand there may be policy issues you'd like to continue discussing. Nevertheless, a seniority list seems like a very basic request to make of any [u]nion and one that has been anticipated and discussed for months. I don't understand how that particular item requires discussion. I hope you will provide that information as quickly as possible. [GC Exh. 25.]

It is unclear whether the parties actually met or discussed the seniority list the following Monday. However, it is clear that they worked on it. Shortly after 5 pm that day, Greenberg emailed the Union another list that highlighted certain former "Dial A Ride" (DAR) employees who had become fixed-route drivers in 2012. Greenberg asked the Union if it wanted them to be listed by their 2012 hire date or an earlier date. (R. Exh. 6.)

Cornelius responded by email a few hours later, at 7:50 pm. The email attached a unified "seniority roster" listing the operators by their "date of class," except for the DAR drivers, which were listed by their 2012 dates. The roster revised some of the seniority dates in the Company's initial list, moved some of the operators on the list to correspond with their revised dates, questioned whether some of the listed operators were on the LOA list, and noted that two did not have a seniority date. The email also attached an LOA list with handwritten comments indicating whether some of the listed operators had returned or were still on LOA or out. Finally, the email stated that the roster was not final; that the Company needed to review it and investigate where all the operators on the LOA list were currently and to verify spelling and dates; and that if the Company rolled out its own version "after all the confusion," the Union would "immediately file [an unfair labor practice charge] . . . for bad faith bargaining." See GC Exh. 26, and Tr. 486–487.[7]

The following day, July 9, the Company distributed a memo to the operators regarding the upcoming system bid. The memo advised the operators about the number of available full-time bids to choose from at each location (148 at Mesa and 404 at Tempe) and stated that a seniority list "developed by the Union" for conducting the bid would be posted "very shortly." (GC Exh. 30.) That same evening, at about 6 pm, the Company's attorney (Patrick Domholdt) emailed the Union a revised seniority roster.[8] The email stated that he and Greenberg had reviewed the Union's roster and incorporated some of the changes therein. In particular, the Company moved 15 operators who the Union had indicated should all be listed as being hired on 11/30/2004, rather than the earlier dates identified on the Company's July 3 list. The email also responded to the Union's other comments and questions, identifying those individuals who had

[7] Cornelius actually sent the foregoing email and attachments to the Federal mediator, who had been assisting the parties in the contract negotiations since late June, rather than to Greenberg. And Greenberg testified that he did not recall seeing the email. However, he acknowledged that he received the attached seniority roster, and that it was the mediator's practice to forward the parties' emails. (Tr. 335, 339, 664–665.). Accordingly, while the matter is not free from doubt (there is no copy of the mediator's forwarding email in evidence), I find that the Greenberg did, in fact, receive Cornelius' email.

[8] Like Cornelius had earlier, Domholdt actually sent the email to the federal mediator, rather than to the Union. However, the mediator forwarded it to Cornelius.

declined employment, had retired or left Veolia as of July 1, had been out on LOA more than a year or were not active employees, or were possibly out on workers compensation (GC Exh. 27).

Cornelius replied to Domholdt an hour later, stating that the Union would review the information and respond (R. Exh. 7). However, early the following morning, July 10, Greenberg notified the Union that there was no more "slack time" left to meet the July 22 deadline, and that "operational reality" required the Company to move forward with the system bid (GC Exh. 55). Accordingly, and because the Company believed it had adequately responded to the Union's questions and concerns, the Company immediately posted a revised seniority roster consistent with what it had sent to the Union the previous day, and proceeded with the system bid until it was completed on July 12. (Tr. 346, 353–355, 401–404, 442, 661–671, 774, 777.)

Nevertheless, the Union and the Company continued to correspond about the accuracy of the posted seniority roster. See GC Exh. 28 (Cornelius' subsequent email and attachment on July 10) and GC Exh. 29 (Greenberg's July 15 email and attachment in response). In the meantime, on July 11, the Company also addressed the matter in a memo directly to all employees. The memo stated:

> The Union's allegation that the Company forced a system bid on the employee[s] is simply inaccurate. The Company has made the Union aware of the need for a system bid throughout negotiations. We also repeatedly and urgently requested a seniority list from the Union without success up through this past Monday night. When a seniority list was never provided by the Union, I sent the Union a seniority list for their approval on July 3, 2012 [sic]. The Union finally sent over a seniority list for the system bid on July 8, 2013. We have posted this same list with only the tiniest corrections (e.g., eliminating someone listed twice).
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> To the extent there are any inconsistencies in the seniority list, please contact the Union. The Company is more than willing to work with the Union to correct any inaccuracies in the list before the division bid set to take place very shortly. [GC Exh. 34.]

The Union eventually approved a seniority list several months later, in late 2013 or early 2014 (Tr. 526–527, 538–539, 565, 1046).

1. Alleged failure to bargain over the seniority list

As indicated above, the General Counsel alleges that the July 2013 seniority list was a mandatory subject of bargaining and that the Company unlawfully failed to bargain over it to agreement or impasse. The Company, on the other hand, denies that the seniority list was a mandatory subject of bargaining (GC Exh. 1(n)). It further argues that time was of the essence and that it had a compelling business justification for unilaterally implementing the list on July 10 and starting the bidding process (R. Br. 23–26).

In agreement with the Company, I find that there was no duty under the Act for the parties to bargain to agreement or impasse over the July 2013 seniority list.[9] As indicated above, the parties executed an interim agreement on July 1 that specifically incorporated a TA addressing how seniority for the July system bid would be determined (by dovetailing seniority according to hire date). It is well established that such interim agreements are final and binding during the specified period even though the parties continue to bargain over a contract. See *Galaxy Towers Condominium Assn.,* 361 NLRB No. 36 (2014), citing *Stroehmann Bakeries*, 289 NLRB 1523, 1524 (1988) ("parties negotiating for a contract always have the ability to make any provisions final and binding along the way, thus precluding any further negotiations on those issues").[10]

Further, nothing in the July 1 interim agreement indicates that the parties reserved for further bargaining the July 2013 unified seniority list itself. Nor is there any apparent reason why the parties' would have done so; the only remaining task was to prepare an accurate list according to agreed criteria.[11] As indicated in Greenberg's July 5 email, the concept of bargaining to agreement or impasse is not typically applied to such tasks. Rather, the well-established and judicially approved method for dealing with disputes over such matters is the parties' contractual grievance-arbitration procedure. Like most collective-bargaining agreements, the Veolia contracts at Mesa and Tempe, which the parties adopted in relevant part in their July 1 interim agreement, contained such grievance-arbitration procedures. See GC Exh. 9 (art. 17) and GC Exh. 10 (art. 13). And there is no reason to believe those provisions would not apply to a dispute over whether particular employees were listed out of correct order of seniority.[12]

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[9] The statutory duty to bargain, where it exists, is mutual. See Sec. 8(d) of the Act (the obligation to bargain collectively "is the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ."). See also *Wald Mfg. Co. v. NLRB*, 426 F.2d 1328, 1331 (6th Cir. 1970), and cases cited there. Here, the Union and the Company appear to disagree about which party had the obligation to prepare a seniority list. As indicated above, the Company appears to have that obligation under the terms of the interim agreement. However, it does not really matter. Regardless of which party had the obligation to prepare the list, as discussed herein there was no duty for both parties to bargain to agreement or impasse over the accuracy of the list before it was posted and implemented.

[10] The General Counsel's posthearing brief offers no reason to deny the July 1 interim agreement final and binding effect during the specified period. Indeed, the General Counsel's analysis (pp. 56–59) does not even mention the July 1 interim agreement.

[11] There is no allegation that the implemented list violated the interim agreement, i.e., that the Company deviated from the criteria set forth in the agreement in preparing the list.

[12] See, e.g., *Southwestern Bell Telephone Co.*, 198 NLRB 569 (1972) (deferring to the parties grievance and arbitration procedure complaint allegations that the employer unlawfully failed to comply with contractual provisions governing part-time work and seniority); and *Campbell Sixty Six Express*, 200 NLRB 1126 (1972) (deferring to decision of grievance-arbitration panel regarding employee's seniority status, and therefore dismissing complaint allegations that both the union and the employer unlawfully caused her layoff). Assuming the waiver doctrine is applicable in this situation, for the same reasons I would find that the Union clearly and unmistakably waived or consciously yielded any statutory right it had to bargain over the list. See *Galaxy Towers Condominium,* above (union waived the right to bargain over employer's

Of course, parties to such an agreement may nevertheless find it useful to work together, i.e. to consult and cooperate, about the matter beforehand, whether to avoid a subsequent grievance-arbitration proceeding or simply because it makes good sense. Indeed, the parties may agree that such consultation and cooperation is required. As indicated above, this is essentially what occurred here, as the Union had the right under the adopted seniority TA to determine the seniority position of operators who had the same date of hire. And the Company attempted to engage in consultation and cooperation by sending drafts to the Union for review and approval.[13] By doing so, however, the Company did not incur a legal obligation to bargain over the list to agreement or impasse before proceeding with the system bid. See *United Technologies*, 300 NLRB 902 (1990). Nor, in the absence of a duty to bargain, did the Union's demand to bargain over the list—assuming arguendo that its July 5 and 8 responses to the Company's attempts to communicate and consult about the list constituted a timely demand[14]—compel the Company to do so.

As indicated above, the Company also argues that it was justified in unilaterally implementing the list when it did because it had to complete both the system bid and the subsequent division bid by July 22 under the RPTA service contract. However, given my finding above that there was no duty to bargain over the list in the first place, there is no need to address this issue.

2. Alleged direct dealing with employees about the seniority list

The General Counsel additionally alleges that that the Company's July 9 and 11 memos to the employees constituted unlawful direct dealing because they effectively blamed the Union for any inaccuracies in the seniority list, when in fact the Union never approved it. Indeed, the General Counsel asserts that "Respondent's conduct is hornbook law on direct dealing" (GC Br. 51).

Direct dealing, however, "involves dealing with employees (bypassing the union) about a mandatory subject of bargaining," *Champion International Corp*., 339 NLRB 672, 673 (2003), or attempting to "undercut[] the union's role in bargaining," *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000). As discussed above, the parties here had no legal obligation to bargain about the seniority list. Nor do the Company's July 9 and 11 memos evince an intent to undermine the Union as the operators' bargaining representative generally. As indicated above, at the time the Company distributed the July 9 memo stating that a seniority list "developed by the Union" would soon be posted, the Company had in fact received a revised list from the

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decision to subcontract unit work by agreeing to immediately implement a TA on management rights that permitted the employer to unilaterally subcontract unit work).

[13] See, for example, the email exchange between Greenberg and Cornelius on July 5 (GC Exh. 25).

[14] See *AT&T Corp*., 337 NLRB 689, 692 (2002); and *Emhart Industries*, 297 NLRB 215, 216 (1989) and cases cited there (union must act with due diligence in requesting bargaining over a forthcoming change in order to enforce an employer's obligation to bargain over it).

Union.[15] And the Company incorporated one of the most significant changes in the Union's July 8 roster: listing 15 of the operators as being hired on 11/30/2004 rather than the earlier dates that had been identified in the Company's initial draft. Compare GC Exhs. 24(a), 26, and 27 (drivers Aguayo, Cufurovic, Hendrix et al.). See also the Company's email accompanying GC Exh. 27 ("While the Company is not aware of the history behind the lumping of the 11/30/2004, we did not change the order that the Union placed them in."). Further, as the General Counsel concedes (Br. 20), the Union's July 8 list was not accurate because not every driver was listed by correct seniority. Thus, it was entirely reasonable for the Company to recite in its subsequent July 11 memo how the posted list had come about. Moreover, the July 11 memo encouraged the operators to contact the Union if they had questions or concerns about the seniority list. It also made clear that the Company remained willing to "work with the Union to correct any inaccuracies in the list," and the record indicates that the Company did so.

3. Alleged failure to provide information about individuals on the seniority list

The General Counsel also alleges that the Company unlawfully failed to fully respond to the questions Cornelius raised in his July 8 email about certain individuals on the Company's list. However, the record fails to support this allegation. Cornelius acknowledged that Domholdt's July 9 email responded to the questions he raised about the individuals, and that the Company adequately answered his questions with respect to most of them. Further, he testified that he could not recall if the Company answered the follow-up questions he raised in his July 10 email about the remaining individuals. (Tr. 494–505.)[16]

Accordingly, all three complaint allegations regarding the July 2013 unified seniority list are dismissed.

B. The New Run Cuts

The complaint alleges two 8(a)(5) violations with respect to the July 2013 run cuts. First, like the seniority list, the complaint (par. 7(f)–(i)) alleges that the new run cuts were a mandatory subject of bargaining and that First Transit unlawfully failed to provide the Union with notice and an opportunity to bargain over them to agreement or good-faith impasse prior to posting them. Second, it alleges (par. 7(j), (k)) that the Company unlawfully failed to respond to the Union's requests in June for any notes or drafts from internal management meetings where the run cuts were drafted. As discussed below, these allegations are without merit as well.

A "run cut" is a schedule showing the runs and hours that an operator would drive over the course of a week. The weekly runs are typically "cut" by a professional run cutter from the bus routes and schedules (a/k/a "blocks") issued by the RPTA. Once finalized, the run cuts are placed in packets and posted for the operators to bid on. (Tr. 144–150, 251–270, 832, 848–849, 858, 947–956; GC Exhs. 13, 14.)

[15] Although Cornelius testified that the attachment to his July 8 email was not intended to be a seniority list (Tr. 538), his email described it as a "seniority list," and the attachment was entitled "Seniority Roster." See GC Exh. 26. Further, the General Counsel's brief concedes that the attachment was "the Union's proposed seniority list" (Br. 34).

[16] The General Counsel's brief acknowledges this testimony (p. 34), but fails to address it (p. 53).

The Union asked to see the new run cuts at the parties' very first meeting on February 19 and virtually every bargaining session thereafter. However, the run cutter retained by the Company did not even begin cutting the runs until after the blocks were issued by the RPTA in late April. Nevertheless, the Company advised the Union that the run cuts would be provided as soon as they were available.[17]

Eventually, on June 13, the Company gave the Union a box containing an initial draft of "paddles"—detailed worksheets showing what an operator's runs and hours would be over the course of a single day (see, e.g., GC Exh. 57). However, the Union continued to request the weekly run cuts.[18] Accordingly, about 2 weeks later, on June 25, the Company also provided the Union with a draft of most of the run cuts.[19]

As discussed above, several days later, on July 1, the parties executed an interim agreement covering the month of July, when both the yard and the run bids would take place. The interim agreement incorporated the recent TAs on seniority and choice of work assignments. In addition, it otherwise adopted the Veolia contracts at Tempe and Mesa. Those contracts contained various provisions relevant to the run cuts, including provisions addressing "run and time" and "hours of work." See GC Exhs. 9 and 10.

About 10 days later, on July 11, the Company gave the Union several more drafts, and eventually, a final or accurate copy of the run cuts. The same day, the Company began distributing the Tempe packets containing the run cuts for those 404 operators who were assigned to that yard following the system bid. It distributed the Mesa bid packets for the 148 operators at that yard the following day, on July 12. The actual bidding for the runs at Tempe and Mesa began on July 12 and 16 respectively, and continued on consecutive days thereafter until completed on July 19, the Friday before the July 22 deadline when the new RPTA routes went into effect. See GC Exhs. 31, 32; and Tr. 644, 654, 687, 983–992.

[17] See Tr. 309, 511, 607–611, 621–622, 635–637, 748, 757, 823–834, 959, 962, 970–971, 977–980; GC Exhs. 20, 43, 44, 49, 50; and R. Exh. 8. Union Executive Board Member Dwayne Session testified that he observed a Veolia supervisor cutting the runs for Tempe and transferring them to a personal computer in early April. However, Session could not explain why a Veolia supervisor would be working on the July run cuts for First Transit or why he would transfer them to his personal computer if he was doing so. See Tr. 961–967, 1053. Further, there is no other evidence to contradict the substantial testimonial and documentary evidence that the runs were cut by a different individual, Peter Snell, a professional run cutter retained by First Transit, and that First Transit was still requesting the run cuts from Snell on June 3. See, e.g., GC Exh. 47.

[18] See GC Exh. 51; and Tr. 641, 680–681, 752–753, 802–803, 829–834, 971–972.

[19] See General Manager Peter Greenberg's notes from the June 25 bargaining session, GC Exh. 51/R. Exh. 8, p. 11 ("Mesa bid coming ~9 am . . . most of Tempe by COB"; "Mesa bid given to Union = 10:15 am"; "4:30 for run cut"); and his related testimony, Tr. 758, 790–792. I discredit the testimony of Union President Robert Bean and Executive Board Member Session to the extent it indicates that the Company did not actually provide the Union an initial draft of the run cuts on or about June 25. See Tr. 860–862, 1056 (testifying that they did not recall or remember receiving them).

1. Alleged failure to bargain over the run cuts

For essentially the same reasons stated previously regarding the seniority list, I find that the Company had no duty to bargain to agreement or impasse over the run cuts. As discussed above, the parties executed an interim agreement on July 1 that specifically addressed the issues necessary to move forward with the July yard and run bids. Indeed, as previously noted (fn. 4), Cornelius acknowledged that this was the very purpose of the agreement.

As with the seniority list, at the time of the July 1 interim agreement there remained some work to do on the run cuts. But nothing in the interim agreement, or the incorporated Veolia contracts and TAs on seniority and choice of work assignments, indicates that the parties reserved the run cuts for further bargaining prior to the July bid. The Veolia Tempe contract required only that the run cuts be submitted to a "committee," consisting of both managers and union representatives, which would simply review them for any errors or violations of the contract or the law.[20] And the Veolia Mesa contract did not require even that (GC Exh. 10; Tr. 821–822, 837–838).

Moreover, there is no evidence that the Union, which had never bargained over the run cuts with Veolia,[21] actually wanted to do so with First Transit, or that it notified First Transit at that time that it wanted to do so.[22] Although it repeatedly requested a copy of the run cuts, the record indicates that it did so, not to bargain over the run cuts themselves, but to evaluate the impact of combining the yards and formulate the Union's positions on various issues in the ongoing contract negotiations, including seniority, the number of hours per week, days off, and split shifts (Tr. 516–517, 823–827). Indeed, the Union did not request bargaining over the run cuts even after the Company gave it the initial draft of them on June 25. Nor did the Union request bargaining over the run cuts on July 11, when it received further drafts and the final version, or thereafter. Rather, it simply objected on the ground that the seniority list was inaccurate and that the run cuts/bid packets had not been reviewed by the Tempe run cut committee.[23]

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[20] See GC Exh. 9, sec. 12, p. 35 ("The Company will establish a Run Cut Committee when putting together a general bid. The Union will identify one (1) representative to be part of this committee."), and Tr. 457–458, 461–462, 819–821. As noted by the General Counsel, First Transit admittedly failed to create or submit the run cuts to such a committee, notwithstanding the Union's repeated reminders, both at and away from the bargaining table, that the Veolia Tempe contract required it (Tr. 521, 643, 678, 687–689, 698, 836, 862–863, 960–961, 966–970, 977, 1054). However, the complaint does not allege that the failure to comply with the Veolia Tempe contract in this respect was unlawful under Section 8(a)(5) and (d) of the Act. Compare the allegations in paragraph 7(c)–(e) of the complaint, addressed infra, regarding the alleged failure to follow posting and bid procedures and to assign behind-the-wheel training work to unit employees. Accordingly, it is neither necessary nor appropriate to address that issue. See, e.g., *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 fn. 5 (2007).

[21] Tr. 282, 294–295, 820.

[22] See the cases cited in fn. 14, supra. See also *WPIX, Inc*., 299 NLRB 525 (1990) and cases cited there (employer has no duty to bargain where union fails to clearly signify its desire to engage in bargaining after learning of the forthcoming change).

[23] See Session's testimony, Tr. 992–993. Compare the Union's unfair labor practice charge, which was not filed until approximately 6 weeks later, on August 28, 2013 (GC Exh. 1(c)). To

As with the seniority list, the Company also argues that there was no time to bargain to agreement or impasse over the run cuts. Again, however, there is no need to address this issue as there was no duty to bargain over the run cuts.

2. Alleged refusal to provide internal meeting notes about the run cuts

As indicated above, the General Counsel also alleges that the Company unlawfully failed to respond to the Union's request on June 11, and again on June 30, for any notes or drafts from internal management meetings where the run cuts were drafted.[24] However, there is insufficient credible evidence to support this allegation. Although Union Executive Board Member Dwayne Session testified that Cornelius orally requested such information at the parties' bargaining meetings on June 11 and 30, and that he observed Greenberg make a written note of the June 11 request (Tr. 970–971, 979–980), there is no corroborating evidence of this. Greenberg's notes from the June 11 meeting (R. Exh. 8, pp. 9–10) contain no mention of such a request. And there are no notes whatsoever in the record regarding the June 30 meeting. Further, Cornelius himself testified only that he "may have . . . possibly, maybe" made a request for such notes on June 11, and his recollection was that it was in writing (Tr. 517–518). Again, there is no corroborating evidence of such a written request. Similarly, he testified only that it was "possible" that the Union subsequently renewed the request (Tr. 520).

Accordingly, like the allegations involving the seniority list, both of the complaint allegations regarding the run cuts are dismissed.

C. The Posting and Bidding Procedures

Unlike with the seniority list and the run cuts, the complaint does not allege that First Transit failed to bargain to agreement or impasse over the posting and bidding procedures. Rather, the complaint (par. 7(c)) alleges that the posting and bidding procedures followed by the Company in conducting the yard and run bids modified the terms and conditions set forth in the TA on choice of work assignments that the parties incorporated into their July 1 interim agreement, in violation of Section 8(a)(5) and (d) of the Act. Specifically, the General Counsel contends that the Company violated the provisions of the TA by: (1) failing to give 30-days advance notice to the operators before the system bid began on July 10; (2) failing to post the run cuts/bid packets for the division bid at Tempe at least 3 days before the bidding began on July 12; and (3) failing to limit bidding for the division bid at Tempe to weekdays. For the reasons set forth below, this allegation is dismissed as well.

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the extent Session's subsequent testimony, in response to leading questions from counsel for the General Counsel (Tr. 994), suggests that the Union did object about the failure to bargain over the run cuts, I give it no weight. See fn. 2, above.

[24] The complaint does not allege that First Transit unlawfully delayed providing the Union with the requested run cuts themselves.

As indicated above, the record confirms that the Company did not post a notice to the operators about the system bid until July 9, the day before it began,[25] and that it did not post the run cuts/bid packets for the division bid at Tempe until July 11, likewise the day before the bid began. The record also confirms that the Company conducted the division bidding for the 404 drivers at Tempe in larger groups (58 rather than 40 drivers per day) and on the weekend.[26] However, it is well established that a breach of contract does not constitute an unlawful contract modification under Section 8(a)(5) and (d) of the Act if the employer had a sound arguable basis for its interpretation of the parties' agreement and was not motivated by union animus or bad faith. See *J. Picini Flooring*, 355 NLRB 606 (2010), enfd. in relevant part 656 F.3d 860, 865–866 (9th Cir. 2011); *Bath Iron Works Corp*., 345 NLRB 499, 502 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); and cases cited there.

Here, as discussed above, the record indicates, and there is no real dispute, that the system and division bids had to be accomplished before July 22, when the new RPTA routes went into effect, and that the parties executed the July 1 interim agreement with the intent and purpose of moving forward and completing the bids by that date. See fn. 4, supra. Further, although the parties effectively agreed, by incorporating their TA on choice of work assignments, to adopt the specific timetables and procedures therein for conducting the bids, it was plainly impossible to actually comply with them. Indeed, at the time the parties executed the interim agreement on July 1, there were already less than 30 days left before the July 22 deadline.

Moreover, even assuming arguendo that the parties missed this obvious fact on July 1, they realized it shortly thereafter. On July 3, just 2 days after signing the interim agreement, Greenberg and other managers met with Union Executive Board Member Session and a shop steward from the Mesa yard specifically to discuss some "nonprecedential" ideas on how to shorten the bidding process, including reducing the number of days and having more drivers bid each day. Greenberg also emailed his notes of the meeting to Cornelius and Union President Robert Bean later the same day. (R. Exh. 9; Tr. 766, 804–806.) Although the parties did not thereafter reach an express understanding or agreement with respect to those ideas, there is no evidence that the Union offered any alternative ways to accomplish the parties' mutual goal to move forward and complete the system and division bids by the July 22 deadline. See Tr. 804–807.

Finally, as discussed earlier, the Company also had to consider the parties' TA on seniority, which was likewise incorporated in the July 1 interim agreement. Under the terms of that TA, the Company had to prepare a unified seniority list before the initial, system bid could be conducted. And the Company was effectively required by the TA to consult with the Union before implementing and posting such a list. However, the Company did not receive even an initial union response to its July 3 "best shot" at the unified seniority list until the evening of

[25] In agreement with the Company, I find that the first posted notice of the system bid was on July 9 (GC Exh. 30), rather than on July 10 (GC Exh. 36) as asserted in the General Counsel's posthearing brief. The record also indicates that Greenberg emailed Cornelius a draft of the notice on July 5 (R. Exh. 10), but Greenberg never received a response to it (Tr. 775).

[26] See GC Exh. 31. At Mesa, where there were only 148 drivers, the Company posted the run cuts/bid packets a full 3 days before the bidding began, and conducted the bidding only on weekdays in groups of 40 (48 on the last day). See GC Exh. 32.

July 8. By that time, there were only 13 calendar days left before the July 22 deadline, already less than the required number of days under the TA to perform even the division bid alone. As previously indicated, at that point the TA would have required at least 17 calendar days for the division bid—posting of the bid packets for 3 days in advance, and at least 10 working days, plus two intervening weekends, for all of the 404 operators at Tempe to bid in the agreed group size.

Given all the foregoing circumstances, I find the Company had a sound arguable basis to conclude that the parties' interim agreement permitted it to proceed with the system and division bids in the manner it did, and that the Company was not motivated by union animus or bad faith in doing so. Accordingly, it did not violate the Act. See *NCR Corp*., 271 NLRB 1212 (1984) (no violation found where the employer had sound reasons to believe its actions were not prohibited by the contract and solicited the union's input on its plan); and *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (no violation found where the employer's interpretation of the contract was reasonable and found tacit support from the union's conduct). Cf. *Ardsley Bus Co.*, 357 NLRB No. 85 (2011) (reaching contrary conclusion where the employer unilaterally decided not to post the bus runs for bid at all, even though there was no evidence that the company received all or most of the runs with insufficient notice to post them for bid, the contract did not set forth specific posting and bidding procedures that would have prevented any posting and bidding, and the employer did not even attempt to discuss a workable bidding process with the union).

II. ALLEGED CHANGES IN WORK ASSIGNMENTS

As indicated above, the complaint also alleges that First Transit violated Section 8(a)(5) of the Act in July 2013 by making certain unilateral changes in the assignment of split shifts, "hot-coach" work, and behind-the-wheel training work.

A. Split Shifts

The complaint (par. 7(f)–(i)) alleges that First Transit increased the length of time off between split shifts in July 2013 without giving the Union notice or an opportunity to bargain to agreement or impasse over the increase or its effects. The General Counsel asserts that there was an established practice under Veolia of limiting such split times at Tempe to about 4 hours, and that First Transit unilaterally changed this past practice in July 2013 by posting runs at Tempe with split times of over 6 hours. For the reasons set forth below, I find that this allegation is without merit.

The record confirms that the length of time off between posted split shifts in July 2013 increased substantially as compared to the three prior division bids under Veolia. While there were no split times over 4 hours at Tempe in January 2012, and none over 4-1/2 hours in June/July 2012 and January 2013 (GC Exhs. 11–13), there were many split times at Tempe over 5 hours and several over 6 hours in July 2013 (GC Exh. 14).[27] Further, while there is no specific allegation that First Transit is a successor to Veolia, First Transit does not dispute that it could

[27] See, e.g., bid #126 (operator cleared the first run on Monday at 8:43 a.m. and did not report for the next run that day until 14:50 p.m.). Cheryl Riggs, the operations manager at Tempe, admitted that Veolia had tried to minimize the length of the break in split runs at Tempe (Tr. 153). I therefore reject First Transit's argument that the 1–2 hour increase in the July 2014 split times at Tempe was not a substantial change in the past practice.

not make substantial unilateral changes in the unit drivers' prior terms and conditions of employment absent the Union's waiver of the right to bargain.[28]

However, as indicated by First Transit, there was, in fact, such a union waiver in this case. As discussed above, the parties' July 1 interim agreement, which covered the period when the subject bid took place, expressly adopted the Veolia labor agreement at Tempe. That agreement contained provisions specifically addressing split shifts, limiting the percentage of shifts that could be split and barring any split shifts on weekends. It also contained provisions addressing hours of work, limiting the maximum spread time for runs in a single day to 14 hours. See GC Exh. 9, art. 12 (Run and Time Requirements). Nothing in those provisions, however, limited the number of hours between split shifts in a single day.

Moreover, the Tempe agreement also contained a management rights clause (art. 4). The clause stated that, to the extent not expressly abridged by a specific provision in the contract, the Company retained the sole and exclusive right, among other things, "to improve efficiency; to . . . assign . . . employees; . . .to determine the starting and quitting times; to establish the number of shifts; to determine the number of hours to be worked . . .; to promulgate reasonable rules and policies; . . . [and] to decide the processes of operation." See also art. 5 ("The Union recognizes the right of the Company to establish rules, policies, and procedures as it may deem necessary, provided that such are not in conflict with the terms and conditions of this Agreement.").

Accordingly, in agreement with the First Transit, I find that the Union "clearly and unmistakably waived" any right it had to bargain to agreement or impasse over the increase in split times. Cf. *Cincinnati Paperboard*, 339 NLRB 1079 (2003) (management-rights clause preserving employer's right "to schedule and assign work" waived union's right to bargain over employer's change in its shift-trading policy to prohibit an employee from trading less than a full shift to another employee). See also *California Pacific Medical Center*, 337 NLRB 910 (2002); *Good Samaritan Hospital*, 335 NLRB 901 (2001); and *United Technologies*, supra.[29]

I also find that the Union waived any right to bargain over the effects of the increase in split times. Although a contractual waiver of the right to bargain over a change does not necessarily constitute a waiver of the right to bargain over its effects, *Good Samaritan Hospital*, 335 NLRB at 902, as indicated above a union may also waive the right to bargain by failing to request bargaining after learning of the change.[30] Here, the Company provided the Union with a

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There were also split shifts with over 5–6 hours time off between runs at Mesa in July 2013 (GC Exh. 33). See, e.g., bid #91 (operator cleared first run at 8:49 and did not report for next run until 15:02). However, the record is insufficient to determine whether this constituted a significant change from the past practice at Mesa.

[28] See *Rosdev Hospitality, Secaucus LP*, 349 NLRB 202 (2007) ("perfectly clear" successor under *NLRB v. Burns Security Services,* 406 U.S. 272 (1972) may not unilaterally change the employees' terms and conditions of employment, whether they were established by a previous collective-bargaining agreement or by the predecessor's past practices).

[29] The General Counsel's posthearing brief fails to address this precedent, notwithstanding that the Company made clear at the outset of the hearing (Tr. 29) that it would be asserting a waiver defense to this and other allegations based on the contractual management-rights clause.

[30] See cases cited above at fns. 14 and 22. See also *Benchmark Industries*, 269 NLRB 1096, 1098 (1984).

copy of the paddles for the July 2013 division bid on June 13, which showed the operator's schedule for the day, including split times between shifts.[31] In addition, the Company provided the Union with a draft of most of the Tempe run cuts on June 25, which likewise showed the times between split shifts, and several more drafts and the final version on July 11.[32] Further, the Union was admittedly aware of the increase in split times as of July 12. Yet, there is no evidence that the Union ever requested bargaining over the effects of the increase in the Tempe split times.[33] There were plenty of opportunities for the Union to do so. As indicated above, the parties continued during the same period to bargain over a new 3-year contract, which they eventually executed in early September.[34]

Accordingly, the allegation is dismissed.

B. "Hot-Coach" work

The complaint (par. 7 (f)–(i)) alleges a similar violation with respect to so-called "hot-coach" work assignments, i.e., assignments where the operator stands by with a replacement bus at a designated location and delivers it to a fellow operator in the event his/her bus breaks down during a run. The complaint alleges that First Transit unlawfully changed how such work was assigned in July 2013 without giving the Union notice or an opportunity to bargain to agreement or impasse over the change or its effects. Specifically, the General Counsel alleges that First Transit unilaterally began assigning the hot-coach work to "extra-board" operators—unassigned operators who fill in for scheduled drivers who do not come in due to illness, a vacation, or some other reason—rather than including hot-coach work in the bid packets and allowing operators to bid on it as Veolia had done in the past. This allegation is likewise without merit.

The record confirms that First Transit changed the way hot-coach work is assigned at Tempe in the manner alleged, i.e., that it did not include hot-coach work in the July 2013 bid packets at Tempe as Veolia had in the past.[35] However, as with the increase in split times, there was nothing in the Veolia Tempe contract, which First Transit and the Union incorporated into

[31] See GC Exh. 57, a sample paddle showing a straight Saturday shift; and Tr. 847, 856–858. Although the paddles were not in final form, they contained mostly minor errors in headings and deadheads, and Greenberg told the Union this (Tr. 579, 641, 680–681, 752–753, 802–803, 830–831, 855). I discredit Session's testimony (Tr. 977) that Greenberg also told the Union to "disregard" the paddles.

[32] As previously noted, there is no allegation that the Company unlawfully delayed in providing the draft and final versions of the run cuts to the Union in response to its requests for that information.

[33] Session acknowledged that the Union simply reiterated to the Company that the run cuts were supposed to be reviewed by the joint management-union run cut committee at Tempe (Tr. 995–996).

[34] See GC Exh. 4. The new 3-year contract, which by its terms is retroactive to July 1, likewise does not contain any limitations on split times.

[35] See Tr. 154, 248, 276, 651–655, 725–726, 997; GC Exhs. 11 (PKT ##4246–4263) and 12 & 13 (PKT ##4250–4264); and GC Exh. 52. First Transit admits this (Tr. 186, 365; R. Br. 11, 30), and as discussed above does not dispute that it had an obligation to continue the past practices at Tempe absent the Union's waiver of the right to bargain. As with the increase in the time between split shifts, I find that assigning hot-coach work to extra-board drivers was a

their July 1 interim agreement, that required First Transit to post hot-coach work for bid or otherwise prohibited the Company from changing the way such work was assigned. Further, as discussed above, the management-rights clause specifically reserved to the Company the sole and exclusive right to assign employees to the extent not expressly abridged by the contract. In agreement with First Transit, therefore, I find that the Union waived any right to bargain over the change.

For essentially the same reasons discussed above regarding the increase in split times, I also find that the Union waived any right to bargain over the effects of the change. Again, the Union was admittedly aware of the change as of July 12, but there is no evidence that the Union ever requested bargaining over its effects, either at the time or during subsequent bargaining sessions over the new 3-year agreement. Session acknowledged that he simply told Greenberg that the change was contrary to the practice under Veolia and that he would be filing an unfair labor practice charge (Tr. 997–999). See also Tr. 695–696, 863–864.

Accordingly, this allegation is dismissed as well.

C. Behind-the-Wheel Training Work

The complaint (par. 7(c)–(e)) alleges that First Transit also violated the Act in assigning behind-the-wheel (BTW) training work. Specifically, the General Counsel alleges that First Transit unlawfully modified the terms and conditions set forth in the Veolia contracts at Tempe and Mesa, which the parties adopted in their July 1 interim agreement, by assigning the classroom and retraining portions of BTW training that month to nonunit instructors instead of qualified unit operators, in violation of Section 8(a)(5) and (d) of the Act. See also GC Br. 6–7, 55–56. For the reasons set forth below, I find that the General Counsel has proven this allegation by a preponderance of the evidence with respect classroom training, but not retraining.

As indicated by the General Counsel, the Veolia contracts at Tempe and Mesa clearly contemplated that the training work would be assigned to unit operators. Both provided that "any open trainer position" would be posted; that assignments for duty as a line instructor would be "equalized among interested operators" when practical; and that operators would receive an additional dollar per hour when used as BTW trainers or line instructors (GC Exh. 9 (art. 26); and GC Exh. 10 (art. 25). Further, pursuant to these contractual provisions, the unit operators did, in fact, perform all types of training, including classroom training and retraining, under Veolia (Tr. 156–160, 245, 395–397, 842, 930, 933, 946).[36]

The record also establishes that the unit operators no longer perform any classroom-training or retraining work. While First Transit assigns other types of BTW training work to qualified unit operators, it does not assign them any classroom-training or retraining work (Tr.

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significant change in the past practice at Tempe. Contrary to the General Counsel's brief (p. 15), however, there is no evidence that there was a practice of posting the hot-coach work for bid at Mesa.

[36] Veolia managers also conducted part of the classroom training, but unit operators conducted the rest (Tr. 419–422, 440–441).

1085, 1077, 1099–1100). Indeed, First Transit admits that it has assigned all of this work to nonunit instructors since July 2013.[37]

Thus, the only issue is whether First Transit actually conducted any such training in July, when the interim agreement was in effect.[38] In agreement with First Transit, I find that there is no evidence that any retraining was done in July. The only witness who testified about whether retraining occurred in July was Safety and Training Manager Stephen Mason, who said he could not remember (Tr. 1084). However, a preponderance of the evidence supports a finding that the Company conducted classroom training in July. Although Greenberg and Mason gave conflicting testimony about this, with Greenberg saying the first class was in July (Tr. 682, 727–728, 782–784), and Mason saying it was in September (Tr. 1076–1077, 1110–1111, 1120, 1133), I credit Greenberg. His testimony is consistent with other evidence, including the July 3 unified seniority list created by the Company, which showed several individuals with July 1, 2013 hire dates (GC Exh. 26(a)). Further, the Company has not offered any reason why Greenberg's testimony should not be given more weight than Mason's.

Accordingly, I find that First Transit violated the Act as alleged by not assigning any classroom-training work in July 2013 to the unit operators.

III. ALLEGED FAILURE TO PROVIDE THE UNION WITH REQUESTED PAYROLL INFORMATION

The complaint (par. 7(m), (n), (q)) also alleges that First Transit violated Section 8(a)(5) of the Act by failing to provide the Union with copies of all paystubs issued to all unit employees from July 1 to 16, 2013. This allegation is supported by a preponderance of the evidence as well.

The record establishes, and there is no real dispute, that the Union requested the pay stubs on July 16 to investigate whether to file a grievance against the Company for unilaterally changing the payroll cycle in violation of the parties' interim agreement (GC Exh. 42; Tr. 505–508). As indicated by the General Counsel, such information is presumptively relevant,[39] and the Company has not offered any argument to rebut that presumption. Further, it is likewise undisputed that the Company never provided the Union with the pay stubs of all the unit employees for the requested period. Greenberg admitted that he only gave the Union a list of about 300+ check stubs and individuals who were paid with the information that was on their stubs (Tr. 675–677).[40] Although such a list, assuming it was complete, might arguably have

[37] See R. Br. 11. Given the contractual provisions and history cited above, I reject First Transit's argument that the Company had a sound arguable basis, based on its general right to assign work under the same provisions and the management rights clauses, to assign all classroom-training and retraining work to nonunit employees.

[38] The subsequent 3-year agreement, which the parties executed in early September, does not include all of the same training provisions that were in the Veolia contracts. See GC Exh. 4. Apparently for this reason, the General Counsel only contends that First Transit unlawfully modified the July 1 interim agreement.

[39] See, e.g., *Southern New England Telephone Co*., 356 NLRB No. 62 (2010); and *Southern California Gas Co*., 344 NLRB 231, 235 (2005), and cases cited there.

[40] I credit Greenberg's testimony that he provided the Union the list by email and/or in person, which was not directly controverted.

satisfied the Company's obligations under the Act in the absence of any union objection,[41] the Company has failed to show that the list was complete, i.e., that only about 300+ of the 500+ unit operators employed by the Company at the time were paid between July 1 and 16, 2013. Accordingly, I find that the Company violated the Act as alleged.

IV. ALLEGED DIRECT DEALING REGARDING THE CONTRACT NEGOTIATIONS

The complaint (par. 7(b)) alleges that First Transit also violated Section 8(a)(5) of the Act in July 2013 by posting a memo on July 28, along with a summary of its final economic offer, that solicited and promised to remedy grievances and bypassed the Union and dealt directly with the unit employees regarding the ongoing contract negotiations. For the reasons set forth below, I find that this allegation is without merit.

The subject July 28 memo, which was authored by Greenberg and entitled "UPDATE," stated in total as follows:

> Please accept my thanks for your cooperation and professionalism these past four weeks, as First Transit has initiated our start-up and implemented our new schedules. We look forward to receiving your input on how we can improve our schedules, your working conditions and your ability to provide safe, reliable service to our customers.
>
> In an effort to provide you with information, attached is a summary of the economic offer that First Transit has made to Local 1433. I urge you to educate yourself on our offer and to exercise your right to vote. [GC Exh. 35.]

The "vote" mentioned in the last sentence referred to an upcoming vote on the Company's final offer that the Union had scheduled among its membership. The Company was concerned about the vote because the membership had previously authorized a strike in June, shortly before the July 1 interim agreement was executed (which averted a strike at that time). Thus, the Company knew that the unit employees might very well go on strike if the final offer was rejected. And, in fact, the union membership subsequently rejected the Company's final offer and engaged in a 3-day strike from August 1 to 4 when the parties reached tentative agreement on the new contract. (Tr. 371–372, 467–468, 924–925, 929; GC Exh. 63.)

Given the foregoing context and the record as a whole, I find that the July 28 memo was not unlawful. Although the memo generally invited input from employees about their new schedules and working conditions following the recent yard and run bids, the memo did not propose any specific changes in the employees' schedules and working conditions and there is no evidence that the Company was planning to make any specific changes. Further, the memo did not in any way disparage the Union or suggest that the Company would unilaterally implement changes in mandatory subjects of bargaining based on the employees' input without bargaining

[41] Cf. *Day Automotive Group*, 348 NLRB 1257, 1263 (2006) (finding that the employer did not unlawfully fail to provide the union with requested information about a proposed health plan, as the employer gave the union the information it had at the time and had every reason to believe satisfied the union, and the union gave no indication that it wanted more information).

with the Union. Nor can such an unlawful intent or purpose be inferred from the bargaining history. Prior to the July 28 memo, the Company had met and bargained with the Union on numerous occasions over several months, and executed TAs on a number of significant issues. There is no allegation or evidence that the Company had bargained in bad faith in any way during the negotiations.[42] Compare *Whitesell Corp.*, 357 NLRB No. 97 (2011) and *Chatham Mfg. Co*., 172 NLRB 1948, 1978 (1968) (employers engaged in unlawful direct dealing by inviting employees to submit suggestions at the same time employers were bargaining in bad faith with the union and making statements to employees derogating its role as their bargaining representative), and *Harris-Teeter Super Markets*, 310 NLRB 216 (1993) (employer engaged in unlawful direct dealing by soliciting employee sentiment regarding a specific proposed change that the employer planned to raise with the union in ongoing contract negotiations), with *Permanente Medical Group*, supra (employer did not engage in unlawful direct dealing by consulting with employees about designing a proposed new model of patient care where it was clear that such consultations were not intended to be a substitute for bargaining with the union over the proposal).

For essentially the same reasons, there was likewise nothing unlawful about the last sentence of the memo urging employees to review the Company's final offer and participate in an upcoming ratification vote. See *United Technologies Corp*., 274 NLRB 609 (1985), enfd. 789 F.2d 121, 134–136 (2d Cir. 1986) (employer who had otherwise bargained in good faith did not engage in unlawful direct dealing by communicating with employees in noncoercive terms about positions taken at the bargaining table).

Accordingly, the allegation is dismissed.

V. ALLEGED RESTRICTIONS ON ACCESS AND DISTRIBUTION AND POSTING OF UNION MATERIAL

As indicated, the complaint also alleges certain 8(a)(1) violations. Three of these involve the employees' use of the drivers' lounge at one or both of the facilities. The driver's lounge is a nonwork area where the operators congregate before checking in or between split shifts. There are tables and chairs where they can sit and play cards, etc. There is also an area where they can watch television, and another where they can take a nap. It also contains a designated employee bulletin board where the operators regularly post a variety of work and nonwork-related items. (Tr. 394, 457, 906, 911–912.) The complaint (par. 6(a)–(b)) alleges that the Company unlawfully prohibited access to the drivers' lounge by off-duty employees and restricted the distribution and posting of union material in the lounge.

A. *Prohibiting Off-Duty Employees Access to Drivers' Lounge*

This allegation is based on an incident that occurred on July 17 in the drivers' lounge at Mesa. Session, who as indicated above was a union executive board member and worked at the

[42] The relatively isolated 8(a)(5) violations found above (failing to assign behind-the-wheel classroom-training work to unit operators during the month of July and to provide requested payroll information relevant to a potential grievance) clearly do not outweigh this substantial history of good-faith bargaining.

Tempe facility, came to the Mesa facility early in the morning with a few hundred State wage-and-hour claim forms for the operators to fill out.[43] Session was wearing his uniform and badge, and informed the Mesa dispatcher, as a courtesy, why he was there. He then proceeded into the drivers' lounge and placed the forms on one of the tables, where he assisted the operators in filling them out.

This continued for a few hours without a problem. However, at some point, Teri Collins, a manager for RPTA, noticed what was going on and complained to Donald Kilner, First Transit's operations manager at Mesa. Kilner subsequently approached and asked Session to follow him back to his office. Once there, Kilner told Session he had to stop handing out the forms and to exit the property because he did not work at Mesa. Session objected, showed Kilner his company badge, and said he was there on union business. However, Kilner said he was just following instructions. Kilner then escorted Session back to the drivers' lounge and told Session to take the forms with him. Session then left.[44]

Later that morning, Cornelius emailed Greenberg to complain about Session's removal from the Mesa facility. Greenberg replied a few minutes later, indicating that he would meet with the RPTA about the matter. He followed up with another email several days later, on July 20, stating that he had spoken with RPTA and that "henceforth, no First Transit employee working on our Valley Metro/RPTA project will be treated as a 'visitor.' They will have regular access to both the Mesa and Tempe bus facilities." (GC Exh. 22.)

In agreement with the General Counsel, I find that the Company's removal of Session from the drivers' room on July 17 was unlawful. There is no evidence that the Company had promulgated or published a rule barring off-duty employees access to such nonwork areas. See *Tri-County Medical Center*, 222 NLRB 1089 (1976).[45] I also agree that Greenberg's July 20 email failed to adequately repudiate this unlawful conduct under the standards set forth in

[43] Session was distributing the claim forms to the operators because First Transit had not paid them on July 12, the day they would have been paid by Veolia under its payroll cycle. The Company paid them on July 19 instead (Tr. 1033). This is the dispute that led to the Union's request for payroll information, discussed above.

[44] The foregoing facts are based on the testimony of Session (Tr. 899–910) and Kilner (Tr. 1172 –1177). To the extent their versions conflict, I credit Session. Although I have not credited Session on certain other matters, his testimony with regard to his meeting with Kilner is consistent with what he told Cornelius immediately thereafter (see Cornelius's subsequent email to Greenberg, GC Exh. 22). Further, Collins was not called by the Company to corroborate Kilner's testimony that she only asked Kilner to move Session to a conference room, rather than to remove him from the facility. In any event, even if I were to credit Kilner over Session, I would reach the same conclusion. Under both versions, the Company required Session to leave the drivers' room without establishing any substantial business justification for doing so.

[45] However, I reject the General Counsel's assertion (Br. 49) that this single incident constituted the promulgation of an overbroad "rule" against access by off-duty employees. See *Food Services of America, Inc.,* 360 NLRB No. 123, slip op. at 5 fn. 11 (2014) (senior vice president's unlawful statement to a single employee did not amount to the promulgation of a rule of general applicability), and cases cited there.

Passavant Memorial Area Hospital, 237 NLRB 138 (1978).[46] The email was not sent until several days after the incident occurred and did not specifically refer to the incident. Further, as discussed below, the Company committed other, similar violations later the same month by removing union literature from the lounge. Compare *Raysel-IDE, Inc*., 284 NLRB 879, 881 (1987) (manager effectively repudiated unlawful instruction to employee to remove a union button by retracting it within 24 hours and assuring employee she could wear the button), with *Hanson Aggregates Central, Inc*., 337 NLRB 870, 877–878 (2002) (distinguishing *Raysel* where employer repeated virtually the same unlawful conduct less than a month later).

B. Prohibiting Distribution of Union Material in Drivers' Lounge

This allegation is likewise based on the July 17 incident involving Session, above. In agreement with the General Counsel, I find that, by the same conduct, the Company unlawfully prevented Session from distributing or leaving the wage-and-hour claim forms in the drivers' lounge. See generally *United Parcel Service*, 327 NLRB 317 (1998), affd. 228 F.3d 772 (6th Cir. 2000). See also *Jimmy John's*, 361 NLRB No. 27, slip op. at 1 fn. 2 (2014), and cases cited there (employer may not selectively remove union material based on its content).[47]

C. Removing Posted Union Material from Employee Bulletin Boards

The relevant events regarding this allegation occurred later the same month, shortly after the membership rejected the Company's final contract offer. The Union posted notices at both facilities stating:

BEST AND FINAL
REJECTED BY 95%
STRIKE AT MIDNIGHT
REPORT TO YOUR
LOCATION AND GRAB A
SIGN

(GC Exh. 63.) Although there is a designated union bulletin board at both facilities (as well as company bulletin boards),[48] Session and others also posted the strike notices on the employee bulletin boards because the drivers often did not look at the union board. The notices were posted in various other places throughout the facilities as well, including inside or on the door of

[46] See also *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003).

[47] However, again, I reject the General Counsel's assertion that this single incident constituted the promulgation and maintenance of an overbroad "rule" prohibiting employees from distributing or leaving union literature in the lounge.

[48] Tr. 718. The Veolia contracts at Tempe and Mesa, which the parties' incorporated into their July 1 interim agreement, contained provisions stating that the Union would be provided space for a bulletin board. See GC Exh. 9 (art. 31, sec. 5); and GC Exh. 10 (sec. 6.2). However, the contracts did not address the right to post union material on other bulletin boards. And no party contends that the contracts have any relevance to the allegation.

the employee bathrooms.[49] At Greenberg's direction, however, all but the notices on the union bulletin boards were taken down, including those on the employee bulletin boards (Tr. 326, 697, 719–720, 927–929).

In agreement with the General Counsel, I find that the Company's removal of the strike notices from the employee bulletin boards was unlawful. Contrary to the Company's contention, it makes no difference that the Union could post the notices on other bulletin boards designated for its use, inasmuch as there was no restriction on what drivers could post on the employee bulletin boards. See *Jimmy John's*, above; *Caterpillar, Inc*., 324 NLRB 201 (1997), vacated pursuant to a settlement 332 NLRB 1116 (2000); and *Vons Grocery Co*., 320 NLRB 53 (1995). *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), which the Company cites for the proposition that alternative means of communication must be considered, is clearly distinguishable because it addressed the right of access by nonemployee agents of a unrecognized union, rather than, as here, employee agents of a recognized union. As the Court in *Babcock* noted, "the distinction is one of substance." *Id*. at 113.

VI. ALLEGED VIOLATIONS INVOLVING KARREN SCHWING

The remaining 8(a)(1) allegations involve a probationary employee named Karren Schwing. Schwing was hired to work at Mesa in early November 2013, several months after First Transit assumed operations and the parties executed their new 3-year collective-bargaining agreement. She had previously worked, not for Veolia, but for Greyhound, which is owned by the same parent company (First Group America) as First Transit. The complaint (par. 6(c)–(i)) alleges that, in early January 2014, several days after Schwing discussed her starting wage rate with coworkers and managers, First Transit called her into an investigatory interview about whether she had used abusive language toward a coworker during the discussion, unlawfully denied her union representation at that meeting, and unlawfully threatened to discharge her and discharged her because she had raised questions about the wage rate. For the reasons set forth below, I find that the General Counsel has failed to prove these allegations by a preponderance of the evidence.

Schwing's troubles first began on December 31, after she had completed her 5-week training period, but still well within her 90-day probationary period. Normally, when Schwing reached the last stop on her route for the evening, she would drop off any remaining passengers and deadhead with an empty bus back to the Mesa facility. However, on this particular evening, after putting the bus out of service, she picked up her two children and two grandchildren, who had been waiting at the stop for her. She then deadheaded the 30 minutes back to the Mesa facility with them in the bus. Upon arriving there, she dropped them off near the employee parking lot, gave them her First Transit security gate entry card, and told them to go to her car. About 20–25 minutes later, after returning the bus, she rejoined them at her car and they left.

[49] Tr. 911–912, 925–927. I discredit Session's inconsistent testimony about whether he had previously requested and been granted permission by Veolia to post union notices in the bathrooms and on doors and windows throughout both yards in addition to the bulletin boards. Compare Tr. 915, 1037–1038, with Tr. 927. However, it does not really matter, as there is no allegation that First Transit unlawfully removed the strike notice from the bathrooms, etc.

Unfortunately for Schwing, the Mesa security guard took notice of this and informed Kilner, who as discussed above is the operations manager at the facility. When Schwing arrived to work on January 2, the dispatcher told her that Kilner wanted to see her in his office. When she got to the office, Kilner's door was open and he asked her to come in. So she went in and sat down. Although she had already heard rumors that she was in trouble for the December 31 incident, she did not ask to have a union representative.

Kilner told her about the security report, and asked why she had allowed the four individuals to ride on the bus after it was out of service and had given them the gate security card. Schwing told Kilner they were her family. Kilner replied that it was against company policy, and not to do it again. However, he said he would give her a break and not write her up.[50]

The following day, January 3, Schwing was sitting in the drivers' lounge waiting for her shift to begin when she received a notification on her cell phone. The notification was from her bank, saying that her first post-training paycheck had been directly deposited in her account. When she looked at the amount, however, she thought it was too low. She mentioned this to another new operator, Penny Offenberger, who was sitting next to her. Offenberger suggested that Schwing talk to Danielle Sekol in the payroll department about it.

At some point during this conversation, another nearby operator saw Kilner and asked him to come over and respond to Schwing's concerns. Kilner said Schwing knew what the wage scale was when she applied and should not be complaining about it now. Schwing responded that she could not understand why First Transit's wages were less than Greyhound's since they were owned by the same company. Kilner replied that First Transit's wages were dictated by the new collective-bargaining agreement. He also told Schwing to remove the Greyhound pin that she still had on her hat.[51]

At that point, the conversation ended and Schwing and Offenberger proceeded to Sekol's office. When they got there, Lorraine Salyers, another operator who had been walking ahead of them, opened the door for them and they all walked in together. Schwing then essentially repeated to Sekol what she had said in the drivers' room; that the amount of her check was too low; that she could not live off it; and that she did not understand why First Transit's wages were so much lower than Greyhound's. Salyers, a former Veolia operator at Mesa for several years, spoke up at that point and noted that the operators could get to the top pay level after about 6 years. Schwing thanked Salyers for that information, but said she did not need Salyers' input. Offenberger also responded to Salyers, noting that the top pay at First Transit was the same as the starting pay at Greyhound.

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[50] There is no dispute about any of the foregoing, including the fact that Schwing did not request a union representative, even though she had heard what the meeting was going to be about, and even though Session had previously told her and the other new operators to request a union representative "anytime" they went into a meeting. See R. Exh. 1 (the security report); and Tr. 77–79, 102–103, 199, 210–211, 226, 239–240.

[51] The foregoing account is based on the testimony of Kilner and Schwing (Tr. 79–81, 213–214, 229). Neither side called Offenberger or any other operators to testify about the event. To the extent there are differences in their testimony, I credit Kilner. Although, like Session, I have not fully credited Kilner with respect to other matters, his testimony was more credible than Schwing's with respect to this matter.

Sekol at that point explained that there was a union contract and that First Transit had to pay the amounts set forth in the contract. Schwing responded that Greyhound also had a union contract. However, Sekol replied that it was a different contract. Schwing said that she understood that Greyhound had longer shifts, etc., but repeated that First Transit did not pay enough. At that point, Saylers again spoke up, saying, "Why don't you just go back to Greyhound then?" Schwing replied that she had left Greyhound because she needed more time to spend with her grandchildren. She then turned to walk out of the office and said, "Thanks again for the information, *bitch.*"[52]

Sekol gave a written report of the incident to Kilner later the same day (R. Exh. 2). The following Monday, January 6, both Sekol and Kilner spoke with Salyers and asked if she would fill out an incident report as well (Tr. 86–87, 125–126). Salyers did so the following day (GC Exh. 8).

The next day, Kilner discussed the matter with Claire Spielberg, the assistant general manager of both facilities, and Safety and Training Manager Mason. Kilner also told them about the recent security report regarding Schwing, and that he had talked to her about it and said he would give her a break. Spielberg said Schwing should be terminated given that she was still a probationary employee, and Kilner and Mason agreed. (Tr. 40–49, 89–92.)

The following day, January 9, the dispatcher again informed Schwing that Kilner wanted to see her in his office. When she got there, Kilner asked her to come in and sit down, and she did so. Again, she did not request a union representative. Kilner then went out and brought in Annette Tyler, a lead dispatcher whom management sometimes asks to sit in on such meetings, and closed the door. Kilner informed Schwing what the meeting was about—that he had received a complaint that she had called a fellow employee a "bitch"—and asked what she had to say about it. Schwing adamantly denied doing so, saying that she called the employee a "witch," not a "bitch." Kilner at that point had Schwing step outside, and called Sekol to ask if she was sure that Schwing had called Salyers a "bitch." Sekol said she was sure. Kilner then called Schwing back in and told her that she was being terminated for the incident given her probationary status and the other recent incident reported by the security guard. Kilner then had

[52] The foregoing account is based on the testimony of Schwing and Sekol (Tr. 215–218, 230–231, 240–242, and the written reports filed with the Company by Sekol and Salyers on January 3 and 7, respectively. Neither Offenberger nor Salyers were called to testify about the incident. To the extent there are inconsistencies in the accounts given by Sekol and Schwing, I credit Sekol, who had no real stake in the matter or reason to misreport what happened at the time. In particular, I discredit Schwing's account that she called Salyers a "witch" rather than "bitch." In any event, I find that the Company reasonably believed Sekol's account over Schwing's account. See generally *McKesson Drug Co.,* 337 NLRB 935, 936 fn. 7 (2002); and *Alta Bates Summit Medical Center v. NLRB,* 687 F.3d 424, 434–437 (D.C. Cir. 2012) (the relevant inquiry in mixed-motive cases is not whether the employee actually engaged in the misconduct, but whether the employer reasonably believed the employee engaged in the misconduct).

Schwing step outside again, and completed the disciplinary form.[53] The form (GC Exh. 5) stated that Schwing was a probationary employee, and that she was being terminated during her probationary period for "improper conduct—unacceptable language used toward another employee."

A. Alleged Unlawful Denial of Union Representation

There is no real dispute that the January 9 meeting was investigatory in nature and triggered the right to union representation. However, as discussed above, a preponderance of the evidence indicates that Schwing never requested a union representative at the meeting. Accordingly, the allegation that the Company unlawfully denied her request for a union representative is clearly without merit. See *NLRB v. J. Weingarten*, *Inc.*, 420 U.S. 251, 257 (1975).[54]

B. Alleged Unlawful Threat and Discharge

All parties agree, and I find, that the appropriate test for evaluating this last allegation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[55] Under that test, the General Counsel must prove by a preponderance of the evidence that animus against the employee's union or protected concerted activity was a substantial or motivating factor in the adverse employment action. This requires an initial showing, based on direct and/or circumstantial evidence, that the employer knew that the employee had engaged in union or protected concerted activity and that it harbored animus

[53] The foregoing account of the January 9 meeting is based on the testimony of Kilner (Tr. 93–99), Tyler (Tr. 1146–1168), and Schwing (Tr. 219–222, 232–236), and the reports Kilner and Tyler filed about the meeting on January 13 (R. Exhs. 3, 11). Again, to the extent Schwing's account differs in material respects from the accounts given by Kilner and Tyler, I discredit it. In particular, I discredit Schwing's testimony that she immediately requested a union representative. As indicated above, she admittedly did not request a union representative at the previous meeting on January 2, even though she knew beforehand it could potentially lead to discipline, and even though Session had previously told her and other new operators to request a union representative anytime they went into a meeting. Further, Schwing's version of how the meeting began makes little sense. She testified that Kilner immediately closed the door when she came in, and that this changed the "aura" and prompted her to ask for a union representative. But, there is no dispute that Kilner went out to get Tyler to sit in on the meeting. It is unlikely that Kilner would have immediately closed the door, only to open it again to go and get Tyler. Finally, there is no evidence that Schwing requested a union representative after Tyler came into the meeting. Schwing never testified that she did, and both Kilner and Tyler testified that she did not.

[54] There is no allegation that Kilner violated the parties' collective-bargaining agreement by failing to offer Schwing a union representative.

[55] See also *Signature Flight Support*, 333 NLRB 1250 (2001), affd. mem. 31 Fed. Appx. 931 (11th Cir. 2002) (applying *Wright Line* to 8(a)(1) discharge allegation). The General Counsel does not assert that the analysis in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) applies. See *Triple Play Sports Bar & Grill*, 361 NLRB No. 31 (2014) (discussing the circumstances in which the different analyses in *Burnup & Sims* and other cases apply). However, I would reach the same conclusion applying that analysis.

against such activity. If such a showing is made, the burden shifts to the employer to show that it would have taken the same disciplinary action in the absence of the employee's union or protected activity. *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (citations omitted). See also *Nichols Aluminum, LLC*, 361 NLRB No. 22 (2014).

In agreement with the Company, I find that the General Counsel has failed to make the required initial showing. There is no real dispute that Schwing's discussion with Offenberger about her starting wage rate constituted protected concerted activity, and that the Company was aware of it. However, there is no evidence that the Company harbored animus against such activity. Contrary to the General Counsel contention, such animus is not established by the mere fact that Kilner expressed his opinion that Schwing should not be complaining about the starting wage rate since she knew what it was when she took the job. As Kilner noted, the drivers' wage rates were dictated by the new 3-year collective-bargaining agreement the Company had recently executed with the Union. Further, his comments were not accompanied by any explicit or implicit threats of retaliation.[56]

I also reject the General Counsel's contention that the Company's animus may properly be inferred from the fact that Kilner and Sekol asked Salyers to complete an incident report. It is common practice for employers to take statements from witnesses when investigating a potential disciplinary matter. Indeed, there would be more reason to question the Company's motive if it had not asked Salyers for a statement. See, e.g., *Allied Medical Transport, Inc*., 360 NLRB No. 142 (2014); *ManorCare Health Services-Easton*, 356 NLRB No. 39 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); and *Visador Co*., 303 NLRB 1039, 1044 (1991), enfd. 972 F.2d 341 (4th Cir. 1992) (failure to investigate the matter or interview witnesses supports inference of unlawful motive for discipline).

Finally, I likewise reject the General Counsel's argument that the Company's animus may be inferred from its failure to discipline other employees who used bad language. The record shows that, just 2 months earlier, the Company had given Session himself a verbal warning for using profanity ("fuck") during a loud conversation with Safety and Training Manager Mason in the main corridor (GC Exh. 6; Tr. 55–56, 72). Although the Company disciplined Schwing more severely, Session was not a probationary employee; indeed, he was a union executive board member.[57] Moreover, Spielberg credibly testified that Schwing's language was considered worse because it was directed toward another employee, i.e. it was not just foul language like Session's, but an "assault with foul language" (Tr. 64, 67).

Accordingly, the allegations regarding Schwing are dismissed.

CONCLUSIONS OF LAW

1. First Transit modified the terms and conditions of the parties' July 1 interim agreement by unilaterally failing and refusing to assign behind-the-wheel classroom-training work to

[56] In light of this finding, it is unnecessary to address whether the Company adequately showed that it would have terminated Schwing anyway, even without considering her wage complaints.

[57] There is no allegation that the verbal warning given to Session was unlawful.

qualified unit employees in July 2013, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

2. First Transit also violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with copies of all paystubs issued to all unit employees from July 1 to 16, 2013.

3. First Transit also violated Section 8(a)(1) of the Act by:

(a) Requiring off-duty employee and union official Dwayne Session to leave the Mesa drivers' lounge and thereby preventing him from continuing to distribute wage-and-hour claim forms to employees there on July 17, 2013; and

(b) Removing union strike notices from employee bulletin boards at the Mesa and Tempe facility in late July 2013.

4. First Transit's foregoing unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Company did not otherwise violate the Act as alleged in the consolidated complaint.

REMEDY

The appropriate remedy for the violations found is an order requiring First Transit to cease and desist and to take certain affirmative action, including making whole qualified unit employees for its failure to assign them behind-the-wheel classroom-training work in July 2013. Any such backpay due shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). As set forth in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), First Transit must also compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

Accordingly, based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, First Transit, Inc., Tempe and Mesa, Arizona, its officers, agents, successors, and assigns, shall

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Modifying the terms of its collective-bargaining agreement with Amalgamated Transit Union (ATU) Local #1433, AFL-CIO, without the Union's consent.

(b) Failing and refusing to provide the Union with relevant and necessary information on request.

(c) Denying off-duty employees access to the drivers' lounge to distribute union material or engage in other protected concerted activities.

(d) Prohibiting the distribution of union material in the drivers' lounge.

(e) Removing union notices from employee bulletin boards.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, provide the Union with the paystubs issued to all unit employees from July 1 to 16, 2013.

(b) Make qualified unit employees whole for its unlawful failure to assign them behind-the-wheel classroom-training work in July 2013, with interest compounded daily, in the manner set forth in the remedy section above.

(c) Compensate those employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mesa and Tempe, Arizona copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 9, 2014

_____

Jeffrey D. Wedekind
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT modify the terms of our collective-bargaining agreement with Amalgamated Transit Union (ATU) Local #1433, AFL-CIO, without the Union's consent.

WE WILL NOT fail and refuse to provide the Union with relevant and necessary information on request.

WE WILL NOT deny off-duty employees access to the drivers' lounge to distribute union material or engage in other protected activities.

WE WILL NOT prohibit the distribution of union material in the drivers' lounge.

WE WILL NOT remove union notices from employee bulletin boards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, provide the Union with the payroll information that it requested on July 16, 2013 to investigate a potential grievance.

WE WILL make qualified unit employees whole for our unlawful failure to assign them behind-the-wheel classroom-training work in July 2013, with interest compounded daily, in the manner set forth in the Board's decision.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

FIRST TRANSIT, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-107463 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.